No. 82-1429

IN THE

Supreme Court Of The United States

October Term, 1984

ALABAMA POWER CO., *et al.*,
Petitioners,

v.

SIERRA CLUB, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF ASSOCIATED INDUSTRIES OF ALABAMA, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION OF ASSOCIATED INDUSTRIES OF ALABAMA, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, Associated Industries of Alabama, Inc. (hereinafter "AIA") moves this Court for leave to file as amicus curiae the accompanying brief in support of Petitioners' position in this case. This motion is made necessary because all parties to the proceedings below would not consent to the filing of this brief.

AIA is an association of business and industrial concerns throughout the State of Alabama interested in the vitality and growth of Alabama's economy. AIA appears in

this case because the decision of the lower court will have a significant and substantial negative impact upon the economic well-being of the State of Alabama, the economic opportunities available to AIA members in Alabama, and the ability of AIA members to engage in productive industrial activities at competitive prices.

The lower court's decision unnecessarily requires complicated changes to the existing system of air quality regulation which bear no relationship to the public's health and welfare, but will be very costly for AIA members and other sources. In addition, the lower court's decision needlessly imposes harsh discriminatory impacts upon sources in hilly terrain, such as found in North Alabama. The decision's deleterious impact upon these interests of members of AIA has not been and cannot be fully and adequately represented before the Court by the parties.

Upon the aforesaid justification, AIA moves this Court for leave to file as amicus curiae the accompanying brief.

Respectfully submitted,

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BRIEF OF ASSOCIATED INDUSTRIES OF ALABAMA, INC. IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE ASSOCIATED INDUSTRIES OF ALABAMA, INC.

Associated Industries of Alabama, Inc. (hereinafter "AIA") is an association of business and industrial concerns throughout the State of Alabama interested in the vitality and growth of Alabama's economy. AIA's broad-based membership includes small businesses employing as few as two persons as well as large industrial companies with thousands of employees. One function of the association is to represent the interests of Alabama business and

industry in significant matters of public policy which affect the state's economy in such a way as to be a matter of concern to the entire business community.

AIA appears in this case because the decision of the lower court will have a significant and substantial negative impact upon the economic well-being of the State of Alabama, the economic opportunities available to AIA members in Alabama, and the ability of AIA members to engage in productive industrial activities at competitive prices. The lower court's decision unnecessarily requires complicated changes to the existing system of air quality regulation which bear no relationship to the public's health and welfare, but will be very costly for AIA members and other sources. In addition, the lower court's decision needlessly imposes harsh discriminatory impacts upon sources in hilly terrain, such as found in North Alabama. The decision below will impose upon all industry in such hilly areas much more stringent emission limitations, and concomitant higher costs, than are necessary to protect public health and welfare. Some AIA members will be directly harmed by the consequences of this decision while other members and all citizens of Alabama will suffer the economic losses inextricably associated with such a serious discriminatory impact.

AIA believes that the decision of the lower court is in error. It unnecessarily reverses a reasonable agency rulemaking, and substitutes the lower court's own regulatory preference for that of the agency, a preference which imposes great costs upon AIA members, further unnecessarily complicates the determination of allowable emissions, and contradicts the purposes of Congress. AIA supports the Petition for Writ of Certiorari filed by Petitioners herein and urges the Court to review the decision of the lower court.

SUBSTANCE OF THE BRIEF AMICUS CURIAE

The brief amicus curiae herein discusses the statutory construction of § 123 of the Clean Air Act ("Act"), 42 U.S.C. § 7423 (Supp. V 1981) and the regulatory authority and interpretation of that provision by the Environmental Protection Agency ("EPA").

Under § 110 of the Act, 42 U.S.C. § 7410 (Supp. V 1981), states must adopt State Implementation Plans ("SIPs") which limit emissions from specific sources so as to ensure compliance with the National Ambient Air Quality Standards ("ambient standards") or the Prevention of Significant Deterioration ("PSD") increments. The addition of § 123 to the Act in 1977 clarified that SIP emission limitations must allow for aerial dispersion of smokestack emissions to the degree associated with a stack height consistent with "good engineering practices" ("GEP"). Under § 123, emissions from any stacks built taller than GEP height will be *assumed* to reach ground level with the greater density (less dispersion) associated with the calculated GEP height for that smokestack. This assumed GEP stack height would then be included in the computer modeling of the stack that is used to set the emission limitations. Congress assigned the task of defining GEP stack height to EPA.

EPA adopted final stack height regulations based largely upon the traditional engineering formula used to calculate the stack height necessary to avoid "downwash" from the top of the stack caused by air currents moving around buildings or other obstacles near the stack. EPA defined the statutory terms "excessive concentrations" resulting from downwash caused by "nearby structures" and "nearby terrain obstacles" consistent with traditional engineering principles and the legislative history of § 123. EPA also included a provision to deal with a computer modeling phe-

nomenon unique to air quality regulation in rugged terrain known as "plume impaction". Without this provision, the determination of GEP stack heights and related emission limitations for sources in rugged terrain will place unjustifiably severe limits upon such areas, leading to harsh discrimination against states with rugged terrain. The EPA plume impaction rule avoided an absurd result not intended by Congress and applied the § 123 mandate with fair and effective results throughout the country.

The lower court's October 11, 1983 decision set aside much of EPA's final stack height regulations and made clear that court's preference for a set of proposed regulations withdrawn by EPA in 1979 after substantial adverse public comment. The lower court also reversed EPA's plume impaction provision, which EPA adopted to prevent harsh discrimination against states with hilly terrain, and remanded other regulations to EPA, ordering the agency to promulgate new stack height regulations within six months and to require completely revised SIPs from all states within nine months after adoption of the new regulations.

On February 28, 1984, a Petition for Writ of Certiorari was filed by parties to the proceeding below. AIA has reviewed that petition and appears here in support thereof.

REASONS FOR GRANTING THE PETITION

I. The Lower Court's Opinion Dictates Stack Height Concepts That Will Severely Complicate Air Quality Regulation By Changing The Basis For State Implementation Plans From Actual To Fictitious Pollution Concentrations.

The effects on the ambient air of emissions from a specific source are calculated by means of a computer simulation or model that takes into account the stack height, stack

gas temperature, volume flow, and other variables, as well as meteorological conditions and surrounding terrain. It is by use of these computer models that regulators can estimate the effect of the emissions of a particular source on the ambient standards or the PSD increments. Thus, if the model is constructed properly, it will give a good approximation of the actual effects of the emissions of a particular source. As in any formula, however, changes in any of the variables will cause a change in the estimated effect of the source's emissions on the ambient air. Thus, if any variable is put into the computer program at an assumed figure rather than at its actual one, the estimated ambient air effect will further deviate from the actual real world effect. Stack height is one of those critical variables, and is the one at issue herein, as Congress mandated that sources be given credit for, but only for, stack heights that accorded with good engineering practice.

Historically, "good engineering practice" height or "GEP" height was a technical engineering term describing the stack height required to avoid undesirable "downwash" of emissions from the top of the stack due to turbulent air currents partially caused by surrounding structures and obstacles. Properly engineered stacks have always been and should continue to be built to GEP height in the traditionally understood sense of that term. Congress enacted § 123 of the Act with apparent reliance upon and deference to this traditional understanding of good engineering practice. Likewise, previous EPA guidance and the challenged regulations followed the engineering understanding of GEP stack height, as did state implementation of the Act. Understandably, AIA members have relied for many years upon the traditional engineering concept of GEP stack height.

The lower court rejected EPA's reliance upon the engi-

neering meaning of GEP and indicated preference for a concept of GEP stack height unrelated to engineering principles or previous EPA practices, but clearly mandating emission limitations based upon fictional stack heights significantly lower than heights justified by the traditional engineering practice. From an engineering standpoint, no source has any reason to build a stack shorter than GEP height as that term is understood in the engineering sense. Obviously, then, the lower court's decision could affect the emission limitation calculations associated with virtually every existing source by mandating that emission limitations be set utilizing computer modeling that includes an unrealistically low stack height. Depending upon the stack height and air quality fictions assumed under the court's plan for each respective source, the decision could impose massive compliance costs for many industrial concerns even though the ambient standards and PSD increments are in fact protected by the actual conditions and currently existing limitations.

The lower court's decision will require states to reevaluate emission limits for existing sources using fictitious stack height assumptions. In addition, the "assumed" data for the necessary computer modeling process must incorporate fictional stack heights for other contributing sources *and* false air quality assumptions related to the fictional heights imagined for existing sources in the area. Besides the obvious difficulty of creating and maintaining a compliance program for such a complex and esoteric regulatory concept, the lower court's mandate will require sources to devote environmental resources to protect against fictitious ambient concentrations rather than the pollution concentrations that people actually breathe. The cost to AIA members of complying with the regulatory program preferred by the lower court will be great and is not justifiable

under § 110, § 123, or by any relation to the public health standards of the Act.

AIA agrees with the arguments presented in the Petition for Writ of Certiorari. EPA's final stack height regulations are common sense applications of the traditional understanding of technical statutory terms used by Congress in § 123 of the Act. Most importantly, the regulations fulfill statutory purposes without yielding unreasonable or absurd results. The final regulations are a reasonable application of the statute's provisions and are within the agency's rulemaking mandate and authority. The lower court has exceeded the limits of judicial review. This Court should grant certiorari and review that decision.

II. The Regulatory Plan Preferred By The Lower Court Would Impose Costly Regulatory Requirements Which Have No Relationship To Public Health And Welfare And Were Never Intended By Congress In Enacting §§ 110 Or 123 Of The Act.

The lower court's preferred regulatory program would reject the formulary approach to GEP stack height and the traditional concepts of excessive concentrations caused by downwash and instead give sources credit for only the amount of stack height necessary to avoid a violation of the ambient standards. This approach forces a false assumption as to area air quality upon all other sources and the local air quality program, *i.e.*, that the air surrounding every source is at the threshold of violating the ambient standards. This assumption bears no relation to actual air quality, the health and welfare of local citizens or the real air quality standards fixed by Congress. Nevertheless, such a false assumption could operate to establish a whole new set of *de facto* air quality standards by requiring emissions reductions or offsets from existing or new sources *as if* the ambient standards were being violated even though the

actual air meets or surpasses the ambient air quality standards prescribed by Congress.

Such imaginary air quality violations could smother industrial growth and existing industrial activity unless emission reductions or offsets could be obtained. Naturally, the cost of such offsets would be high, if available at all. Not only would such offsets have no demonstrated relationship to public health and welfare, but these new *de facto* standards would also change with future modeling changes and future changes in the emissions of any other contributing sources. For example, as background concentrations in an area decreased, a lower stack could be assumed without causing an ambient standard violation, thereby changing the basis for calculating GEP stack height under the court's decision, and hence necessitating changes in individual source emission limitations. This ever-changing system of emission standards based on false stack height assumptions has no basis in § 110 or § 123 of the Act. Maintaining consistent compliance with such regulatory system would be extremely difficult and expensive.

The court below justified its view of this matter in large part by its desire to err in favor of overall emissions reductions. Congress, however, should not be presumed to have fashioned *sub silentio* such a comprehensive change in air quality standards and regulations within the plain and relatively specific provisions of § 123. The Congressional purpose was far narrower than the purposes of the lower court. AIA believes that the lower court wholly misconstrued § 123 and its intended impact. This Court should grant the writ and review the decision below.

III. The Lower Court's Rejection Of EPA's Plume Impaction Rule Exposes Sources In Rugged Terrain To Harsh Impacts And Unreasonable Discrimination.

EPA's final stack height regulations included a provision to deal with a phenomenon unique to air quality computer modeling in hilly terrain known as plume impaction. When the emissions from a stack at a source in hilly terrain are falsely assumed to have been released from an imaginary stack shorter than the surrounding terrain, the computer simulation may reflect, albeit imaginarily, a dense and undispersed plume hitting an elevated portion of the local terrain. In reality, such a spot specific impact will not actually occur because the true stack height will be sufficient to allow the plume to pass above all nearby elevations. This phantom effect—called "plume impaction"—could literally eliminate any new sources from locating in rugged terrain areas as well as imposing exorbitant costs on sources already located in such areas.

While Congress required in § 123 that emission limitations not be based upon the dispersion associated with stack height above GEP height, Congress did not intend to discriminate against sources in rugged terrain areas. EPA's plume impaction rule allowed for modeling adjustments to avoid the imaginary spot impact associated with the imaginary stack height. With the corrective influence of the rule, the stack height regulations effectively restrict sources in rugged terrain areas to the GEP stack height credit intended by Congress, but avoid harshly discriminating against economic growth and activity in such areas based upon plume impaction that does not occur in reality. EPA has the authority to adopt regulations reasonably necessary to effectuate all of the objectives of the Act, and should implement the Act in a way that avoids harsh and discriminatory impacts not intended by Congress.

North Alabama, in the foothills of the Appalachian range, includes rugged terrain where application of the lower court's preferred regulatory program, without the corrective influence of the plume impaction rule, could have unreasonably harsh results. Left uncorrected, phantom plume impactions could require severe emissions reductions from existing sources and a virtual moratorium on new source growth. Such hilly areas could lose present and future industries and jobs to flat terrain areas where such hypothetical emissions problems are not assumed. Again, this matter has no relation to the health and welfare of local citizens or the actual air quality of an area. EPA's plume impaction rule was a simple device reasonably necessary to make the final regulations applicable to all areas without unintended discrimination.

Some of AIA's members will feel directly the harsh and discriminatory impact of the lower court's refusal to accept EPA's plume impaction rule. All AIA members will suffer indirectly by sharing in the overall negative economic impact on business and industry in the area. AIA encourages this Court to grant certiorari and review the decision of the lower court.

CONCLUSION

Because of the foregoing and the arguments contained in the Petition for Writ of Certiorari, AIA believes the decision below is in error and contrary to the intent of Congress in adopting § 123 of the Act and the authority of EPA to promulgate regulations to implement that legislation. The writ of certiorari should be granted and the decision below reviewed by the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion of Associated Industries of Alabama, Inc. for Leave to File Brief Amicus Curiae and Brief Amicus Curiae in Support of Petitioner, in accordance with Rule 28 of the Rules of the Supreme Court, have been served on the following parties to this action by depositing the copies in a United States post office, with first class postage affixed, addressed to the counsel of record set forth below at their post office addresses, this 30th day of May, 1984:

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